IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1205 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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LALLURAM RAMESWARUP MAURYA - Petitioner(s)

Versus

MINITA APARTMENT CO-OPERATIVE HOUSING SOCIETY LTD. - Respondent(s)

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Appearance :

MR ASHOK K PADIA for Petitioner No(s).: 1.

MR PREMAL R JOSHI for Respondent No(s).: 1.

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CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date : 20/07/2005

ORAL JUDGMENT

1. Challenge made in this petition filed under Article 227 of the Constitution of India is to the common judgment and order dated 21.3.2002 rendered in HRP Suit No.467 of 1995 and PSRP Application No.5 of 1995 by the learned Judge, Small

Causes Court (Court No.10) Ahmedabad by which the HRP Suit No.467 of 1995 filed by the petitioner has been dismissed whereas PSRP Application No.5 of 1995 filed by respondent No.1 is allowed and thereby in exercise of powers conferred under Section 41 of the Presidency Small Cause Courts Act, 1882 ('the Act' for short), the petitioner was directed to handover vacant and physical possession of the suit room to the respondent on or before 1.9.2003.

2. According to the case of the petitioner, he is residing in a residential premises which is owned by respondent No.1. The suit premises consisted of a room admeasuring 9' x 11' and adjacent to the said room one otta is also there admeasuring 14' x14' open to the sky and adjacent to the said otta there is construction of latrine and bath room which are in use of the petitioner in capacity of a tenant. According to the petitioner, the tenancy began as per the Gregorian calendar and the rent was agreed to be at Rs.20/- per month. The respondent society threatened to vacate the premises. The petitioner, therefore, filed HRP Suit No.467 of 1995 and prayed for injunction restraining the respondent, his servants, agents, persons, etc., from snatching away the possession of the suit premises without due process of law and also prayed for injunction restraining the respondent from interfering with the user of the suit premises.

3. The respondent contested the suit by filing written statement at Ex.15 wherein all the averments made in the suit came to be denied. It was contended the suit was barred by principle of jurisdiction. It was also contended that there did not exist a relationship between the petitioner and respondent as that of a tenant and landlord. It was specifically denied that the petitioner was a tenant of the respondent. It was

averred that the respondent is a co-operative housing society and therefore without serving statutory notice the suit was not maintainable. It was asserted that the petitioner was entrusted the work of a gardener (mali) and for the said work he had been paid wages at Rs.200/- per month. Therefore he was in employment of the respondent society as watchman and gardener. The sum and substance of the written statement filed by the respondent is that the petitioner was never a tenant of the suit premises but was a licensee of the suit premises and on revocation of the licence the petitioner was duty bound to handover vacant and physical possession of the suit premises to the respondent society. Therefore, it was prayed for the dismissal of the suit.

4. From the record it reveals that the HRP suit was presented on 31.3.1995 and thereafter the PSRP Application No.1905 of 1995 was filed on 25.7.1995 wherein it was contended that there was no relationship of tenant and landlord between the petitioner and the respondent. It was also contended that the respondent had never accepted rent or usage charges from the petitioner. Similarly the petitioner had never paid usage charges to the respondent. As a matter of fact, the petitioner was working as a gardener and watchman with the respondent and since 1995 the petitioner was not working as watchman cum gardener with the respondent and that he had left the service of the respondent on his own. Thereafter the petitioner filed HRP Suit No.467 of 1995 and after filing of the suit, the respondent filed PSRP Application No.5 of 1995. Therefore, it was prayed that the petitioner be directed to handover the vacant and physical possession of the suit premises by exercising powers under Section 41 of the Act.

5. PSRP Application No.1905 of 1995 filed by the respondent was contested by the petitioner, inter alia, contending that the application filed under Section 41 of the Act was not maintainable. It was also averred that this application was a counter blast to the suit filed by the petitioner. According to the petitioner, he had not left the service of the respondent. He has filed Application No.323 of 1995 in the Labour Court, Ahmedabad. It was specifically denied that he was a licensee of the respondent and therefore it was prayed to dismiss the application.

6. The learned trial Judge after recording the oral evidence and considering the submissions advanced by the learned advocates appearing for the parties, passed a common judgment and order dated 21.3.2002 by which he dismissed the HRP Suit No.467 of 1995 filed by the petitioner and in so far as PSRP Application No.5 of 1995 which was initiated by the respondent was concerned, the learned trial Judge, in exercise of the powers conferred under Section 41 of the Act, directed the petitioner to handover the vacant and physical possession of the suit premises to the respondent on or before 1.9.2003 which has given rise to the present petition at the instance of the original plaintiff of HRP Suit No.467 of 1995.

7. Mr. A.K. Padia, learned advocate for the petitioner, has contended that the petitioner was never a licensee of the respondent but he was a tenant as he was inducted in the suit premises by virtue of the employment with the respondent. He is residing in the suit premises since last 25 years. It is also asserted that the petitioner had never left the job of the respondent. According to him, he is still in service of the respondent and he has taken out proceedings before the Labour Court in this regard. It is also asserted by him that so far as the invocation of powers

under Section 41 of the Act is concerned, the learned trial Judge has misdirected himself by holding that the application filed by the respondent is covered under Section 41 of the Act. According to him, under Section 41 of the Act, the licensee can file suit before the Civil Court but not before the Presidency Small Causes Court. Therefore, according to him, the learned trial Judge has wrongly assumed jurisdiction and thereby a jurisdictional error has been committed by the learned trial Judge which can be corrected in the petition which is filed under Article 227 of the Constitution of India.

8. In support of the aforesaid contention, he has relied upon the judgment of a Division Bench of the Bombay High Court in the case of Ramesh Dwarkadas Mehra v. Indravati Dwarkadas Mehra, AIR 2001 Bombay 470. He, therefore, prayed that this petition deserves to be allowed by quashing and setting aside the impugned judgment and order and thereby allowing the HRP suit filed by him. It is, therefore, urged to allow this petition and dismiss the PSRP Application filed by the respondent.

9. Per contra, Mr. Premal Joshi, learned advocate for the respondent, has contended that the respondent had never accepted the rent or usage charges from the petitioner nor the petitioner had paid any amount towards the rent or usage charges to the respondent. Therefore, there is no question of any relationship between the petitioner and the respondent as that of a tenant and landlord. It is also contended by him that the petitioner has not produced a single document as a proof to show that tenancy right has been ever created in his favour. On the contrary, the respondent society has produced salary vouchers duly signed by the petitioner

clearly showing that the petitioner was merely serving with the respondent and was never a tenant of the suit premises. So far as reliance placed on the reported judgment of the Bombay High Court in Ramesh Dwarkadas Mehta's case (supra) is concerned, it is contended that the ratio laid down by the Bombay High Court in the said decision is not applicable to the facts of the present case because Section 41 of the Act in State of Maharashtra is different and distinct from Section 41 applied to the State of Gujarat. It is also asserted by him that when the landlord/owner of an immovable property files an application under Section 41 of the Act, the occupier has to file a civil suit under Section 47 of the Act within the stipulated time and has to apply for stay of such proceedings and has also to ask for a declaration that the action of bringing an application under Section 41 of the Act was an act of trespass on the part of the landlord/owner.

10. In support of the aforesaid submission, Mr. Joshi has relied upon a decision of this Court in the case of Saiyed Jabbarhusain v. Hasan Abubakar Malbari, 1997 (3) GLR 2191. Therefore, according to him, there is no illegality or infirmity committed by the learned trial Judge in passing the impugned order and hence the said order does not warrant interference of this Court in this petition which is filed under Article 227 of the Constitution of India wherein the jurisdictional sweep is very limited and confined only to the correcting of the jurisdictional error committed by the court below. In this case, the learned advocate for the petitioner has not been able to point out any jurisdictional error committed by the learned trial Judge. Therefore, according to him, this petition lacks merit and deserves to be rejected. He, therefore, urged to dismiss the petition.

11.This Court has given anxious considered thought to the rival submissions of the learned advocates of the respective parties, perused the impugned order, set of evidence, statutory provisions contained under the Act and the judgments cited at the bar.

12.So far as the factual matrix is concerned, the petitioner filed HRP Suit No. 467 of 1995, inter alia, contending that he was a tenant of the suit premises. The said suit was contested by the respondent by filing written statement, inter alia, contending that the petitioner was never a tenant of the suit premises. The respondent also filed PSRP Application No. 5 of 1995, inter alia, contending that there was no relationship between the petitioner and the respondent as that of a tenant and landlord. As a matter of fact, the petitioner was working as a gardener cum watchman of the respondent and since 1995 the petitioner was not working as a gardener cum watchman of the respondent and the petitioner has left the service on his own. It has come in the evidence that the petitioner has never paid rent or usage charges to the respondent. The petitioner has not produced a single documentary evidence to show that there was a relationship between the petitioner and respondent as that of a tenant and landlord or to the effect that a tenancy right was ever created in his favour.

13.It is an admitted position that the petitioner was working as a gardener cum watchman of the respondent and since 1995 he was not working as gardener cum watchman of the respondent as he had left the service of the respondent on his own.

14.The respondent has produced salary voucher duly signed by the petitioner which clearly shows that the respondent was merely serving in the respondent society and

was never a tenant of the suit premises.

15.The contention that the provisions of Section 41 of the Act is not applicable to the facts of the present case has no substance. A bare look to Section 41 of the Act reveals that the intention of Legislature in providing the jurisdiction to Small Causes Court under Section 41 of the Act is such that when any person has appeared before the Court with a case that a person is a tenant and other side shows that the facts set out by such person are false and the person appeared before the Court is a licensee then if legislature has not cast the jurisdiction to the Small Causes Court under Section 41 of the Act then after the end of the trial the defendant has to face another proceeding before the Civil court and has to apply for decree for eviction against such a person who is found to be a licensee or a trespasser as the case may be, but to avoid the circumstances to become a shuttlecock between Court to Court, Legislature has cast the jurisdiction to the Small Causes Court under Section 41 of the Act.

16.Therefore, according to this Court, in view of the clear intention of the Legislature, Section 41 of the Act is attracted to the facts of the present case and by invoking jurisdiction under Section 41 of the Act, no illegality or infirmity much less jurisdictional error is committed by the learned trial Judge which requires interference of this Court in exercise of the powers under Article 227 of the Constitution of India.

17.So far as the reliance placed on the decision of the Division Bench of the Bombay High Court in Ramesh Dwarkadas Mehra's case (supra) is concerned, according to this Court, the said decision is not applicable to the facts of the present case. In the

said case the Bombay High Court has discussed Section 41 of the Act (15 of 1882) and has held that a suit by licensor against gratuitous licensee can be filed before Civil Court, City Civil Court or the High Court but not before the Presidency Small Causes Court. Further the Bombay High Court's decision will not be applicable to the present case because Section 41 of the State of Maharashtra is different and distinct from Section 41 applied to the State of Gujarat. The difference between the two can be seen from the bare reading of Section 41 of the Act as applicable to State of Maharashtra and Section 41 as applicable to State of Gujarat. In the present case, the petitioner was never a gratuitous tenant. On the contrary, he was serving as a gardener cum watchman of the respondent society.

18.It is required to be noted that when the landlord/owner of an immovable property files an application under Section 41 of the Act, the occupier has to file a civil suit under Section 47 of the Act within the stipulated time and has to apply for stay of such proceedings and has also to ask for a declaration that the action of bringing an application under Section 41 was an act of trespass on the part of the landlord/owner. The petitioner has not resorted to the remedy contemplated under Section 47 of the Act. It may be pointed out that Section 47 of the Act has been deleted from the Maharashtra State and hence so far as State of Maharashtra is concerned, the occupier cannot have a remedy under Section 47 of the Act. (emphasis supplied)

19.In the case of Saiyed Jabbarhusain (supra), learned Single Judge of this Court has aptly discussed the scope, ambit and nature of powers under section 41 of the Act. In the said case it is also ruled that the person inducted as a licensee by Wakf

committee as a Bangi on being discharged from service, licence to occupy the premises was determined and on application filed by Wakf Committee under section 41 for obtaining possession is maintainable. In the said judgment it is also observed that the Judge of the Small Causes Court has misdirected himself in widening the scope of the proceedings and concluding that "long and exclusive possession clearly gives rise to a presumption that he must have been enjoying the possession of the disputed premises as a tenant".

(i) It would be appropriate to quote para 12 of the reported decision, which is as under:

"*Being fully conscious of the fact that the Court was a Court of very limited jurisdiction, supposed to make inquiry under Section 41 of the said Act only, he unfortunately permitted himself to be carried away by a fact which was not even the defence of deceased Hasan Abubakar. Having totally forgotten the scope, nature and ambit of Section 41 of the said Act, he proceeded to record a finding that the deceased Hasan Abubakar who was inducted as a licensee by the Wakf Committee; was in exclusive possession of the room in question and that would create a tenancy in his favour; and that such a right cannot be said to be a right of licensee. The learned Small Causes Court Judge was not deciding a dispute between the landlord and the tenant in which case the matter would have been covered by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. He was very much conscious of the fact that he was deciding an application under Sec.41 of the said Act where the licensee or person who was inducted as licensee by the Wakf Committee was required*

to institute an application under Secs. 46 and 47 for the purpose of declaration that the action of bringing an application under Section 41 was an act of trespass on the part of the Wakf Committee and he was required to apply for stay of such proceeding in the City Civil Court within the stipulated time. For the reasons best known to Shri A.S. Sanghvi, the then Small Causes Court Judge, blatantly misdirected himself in law and dragged himself into the controversy which was not even raised by the deceased Abubakar. On such reasoning, he rejected the application of the Wakf Committee under Sec.41 by the impugned order, least realising thereby that the remedy which was available to the licensee or person who is inducted in the premises under Sec.41 of the said Act by resorting to Secs. 46 and 47 of the said Act was not availed of and he being a Court of very limited jurisdiction cannot open up Pandora's box and cannot create a case which was not even pleaded by the deceased Hasan Abubakar."

20. In view of the clear elucidation of this Court in the above referred to judgment, there is no manner of doubt that the proceedings taken out by the respondent under Section 41 of the Act is maintainable.

21. It is settled principle of law that the powers vested in the Court under Article 227 of the Constitution is a supervisory jurisdiction. The High Court must confine itself to the correcting of error of jurisdiction committed by the courts below and it cannot assume suo motu jurisdiction of appellate court and correct every mistake assumed to have been committed by the Courts below. It is a review of the decision making process and not the decision itself. The High

Court cannot reappreciate preliminary or perceptive facts found by the fact finding authority under the statute. The aforesaid proposition of law is laid down by the Supreme Court in the case of (i) **Mohd. Yunus v. Mohd. Mustaqim and others**, AIR 1984 SC 38, (ii) **Khanna Improvement Trust v. Land Acquisition Tribunal and others** (1995) 2 SCC 557, (iii) **H.B. Gandhi v. M/s. Gopinath** (1992) Supp. 2 SCC 312 and (iv) **State of Maharashtra v. Milind and others** (2000) 1 SCC 4.

22. In the case of **Ouseph Mathai and others v. M. Abdul Khadir,** (2002) 1 SCC 319, the Supreme Court has held that the petition filed under Article 227 of the Constitution of India cannot be treated like an extension of a statutory appeal or revision. There is no dispute that this is a petition filed under Article 227 of the Constitution.

23. Mr. A.K. Padia, learned advocate for the petitioner, is unable to demonstrate what illegality or infirmity much less jurisdictional error has been committed by the learned trial Judge in recording the impugned order requiring interference of this Court in this petition filed under Article 227 of the Constitution. This Court finds itself in complete agreement with the finding, reasoning and ultimate conclusion drawn by the learned Judge of the Small Causes Court as according to this Court no other conclusion was possible except the oner reached by the learned trial Judge which is required to be affirmed by this Court.

24. Seen in the above context, the petition lacks merit and deserves to be

rejected.

25. For the foregoing reasons, the petition fails and accordingly it is rejected with no order as to costs. Rule is discharged. Ad-interim relief granted at the time of issuance of Rule is vacated.

26. At this stage, Mr. A.K. Padia, learned advocate for the petitioner, urges that the interim relief granted by this Court at the time of issuance of rule which has remained operative till today may be continued for a further period of eight weeks to enable the petitioner to approach the higher forum.

27. The prayer made by Mr. Padia, learned advocate for the petitioner has been strenuously opposed by Mr. Premal Joshi, learned advocate for the respondent. According to him, the petitioner has left the job way back in the year 1995 and this proceeding is continued for almost ten years and by the interim relief the petitioner has occupied the room which the respondent society wants to give to another watchman engaged by the society. Therefore, continuance of the interim relief for any further period would cause serious prejudice to the respondent society. Moreover, this Court has ruled that PSRP Application filed by the respondent society under Section 41 of the Act is maintainable.

28. Having considered the request made by Mr. A.K. Padia, learned advocate for the petitioner and the objection raised by Mr. Premal Joshi, learned advocate for the respondent and on the facts and circumstances emerging from the record of the case, it is true that the petitioner has left the job of watchman cum gardener in the year 1995 but he continued the

possession of the room till today by way of the interim relief granted by this Court. Therefore, obviously, the respondent society could not give the room to another watchman engaged by it and therefore the respondent society is deprived of the said facility. Besides this, this Court has discussed all the aspects of the matter and held that the PSRP Application filed by the respondent is maintainable. Therefore, the prayer made by Mr. A.K. Padia, learned advocate for the petitioner, cannot be accepted and hence the same is rejected.

(A.M. Kapadia, J.)

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